

IN THE UNITED STATES  
CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

AUGUST E. MUENTER, Collector, etc.,  
*Plaintiff in Error.*  
vs.  
UNION TRUST COMPANY, as Trustee,  
etc., et al.,  
*Defendants in Error.* } No. 2031

AUGUST E. MUENTER, Collector, etc.,  
*Plaintiff in Error.*  
vs.  
ELEANOR CAMPBELL O'KELLY, as  
Executrix, etc.,  
*Defendant in Error.* } No. 2032

AUGUST E. MUENTER, Collector, etc.,  
*Plaintiff in Error.*  
vs.  
HENRY ROSENFELD et al., as  
Trustees, etc.,  
*Defendants in Error.* } No. 2033

AUGUST E. MUENTER, Collector, etc.,  
*Plaintiff in Error,*  
vs.  
GEORGE D. BLISS JR., as Executor,  
etc.,  
*Defendant in Error.* } No. 2034

AUGUST E. MUENTER, Collector, etc.,  
*Plaintiff in Error,*  
vs.  
ALFRED FRIEDERICH et al.,  
*Defendants in Error.* } No. 2035

Upon Writs of Error the Circuit Court of the United  
States for the Northern District of California.

**BRIEF OF PLAINTIFF IN ERROR**

**FILED**

**OCT 28 1911**

**F. D. MONCKTON,**  
CLERK

ROBT. T. DEVLIN,  
*United States Attorney.*

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Filed this ..... day of October, A. D. 1911.

FRANK D. MONCKTON, Clerk.



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UPON WRITS OF ERROR FROM THE CIR-  
CUIT COURT OF THE UNITED STATES  
FOR THE NORTHERN DISTRICT OF  
CALIFORNIA.

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**BRIEF OF PLAINTIFF IN ERROR**

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STATEMENT.

These five actions were brought by the respective defendants in error against John C. Lynch, as Collector of United States Internal Revenue for the First District of California, and, upon the expiration of the term of office of said John C. Lynch, were continued against the present plaintiff in error as his successor. The object of the action in each case is to recover certain taxes which are alleged to have been unlawfully imposed upon, and collected from, the legacies in the respective cases under and by virtue of the War Revenue Act of June 13th, 1898 (30 Stat. L. 448), which act was amended by an act of March 2, 1910 (31 Stat. L. 948), then supplemented by the Act of June 27, 1902 (32 Stat. L. 406). In the meantime the Act of April 12, 1902 (32 Stat. L. 500) was passed, wherein it was stated that the Act was to be repealed, the repeal to take effect on July 1st, 1902.

In the first suit the defendants in error are the

trustees under the will and the legatees whose interests were subject to the tax in question.

In the second and fourth suits, the executors are named as the defendants in error

In the third suit, the trustees appear in that capacity.

In the fifth suit, the heirs whose legacies have been taxed, are designated as such.

As will be seen from an examination of the records, the same point appears in each case and that is, whether the personal property and legacies distributed under the terms of the respective wills to the respective trustees in trust and to be held in trust for the respective beneficiaries, are contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment within the meaning of the above named Acts of Congress.

Taking each case individually, the following facts are presented:

In the suit entitled *Mueuler vs. The Union Trust Company et al.*, it will be seen that John J. Valentine died on December 21st, 1901, in the County of Alameda, California; that at the time of his death he left a last will and testament which was duly and regularly probated, and the estate was by final de-

creed of distribution distributed in accordance with the provisions of said will, the residue of said estate being distributed by the defendant in error, Union Trust Company of San Francisco, as trustee, to be held in trust for the benefit of the seven children of the deceased, the remaining defendants in error herein, until the youngest child should attain his or her majority, which will be on May 7th, 1920, and not before.

In the second suit, *Muenter vs. O'Kelly*, it appears that Allen G. Campbell died on June 16th, 1902; that he left a last will which was duly probated; that in accordance with certain provisions of that will, certain personal property which was taxed by the plaintiff in error was distributed to Eleanor Campbell O'Kelly as trustee, to be held in trust for the benefit of his daughter, Eleanor Campbell, until this daughter should reach the age of twenty-one years, which will be some time during the year 1921.

In the third case (*Muenter vs. Rosenfeld*) it appears that the testator, John Rosenfeld, died on May 28th, 1902, and that his last will was duly probated and his estate distributed in accordance with its terms. That certain personal property, subject to the tax in question, was distributed to defendants in error, Louis Rosenfeld and Henry Rosenfeld, as trustees for the benefit of the



children of the deceased until a period of eleven years after his death should elapse, provided some one of the children and beneficiaries should so long survive, otherwise the trust should terminate upon the death of the last survivor. This trust does not expire until May 28th, 1913.

In the fourth suit, *Muenter vs. Bliss*, it appears that certain personal property and legacies were distributed under the terms of the will of George D. Bliss, deceased, to certain trustees, to be held in trust for the benefit of one Harriet L. Herrmann, so long as she should remain the wife of ..... Herrmann. At the time of the levy of the tax in question, and at the time of the trial of the suit, Harriet L. Herrmann was still the wife of ..... Herrmann.

In the fifth case, *Muenter vs. Friederich*, the facts show that by the last will of Gustav A. Friederich certain personal property was distributed to two trustees, to be held in trust for the benefit of certain legatees until the youngest of them should attain the age of twenty-one years. This trust expired August 2nd, 1904.

In all cases the income from the property distributed in trust is to be paid to the beneficiaries and in no one instance is the income equal to the sum of ten thousand dollars a year.

## ARGUMENT.

These five cases present the following question, namely: Whether the personal property and legacies distributed under the terms of the respective wills to the respective trustees in trust and to be held in trust for the respective beneficiaries, are contingent beneficial interests, or whether the property in each case vested absolutely in possession or enjoyment, thereby becoming subject to the tax within the meaning of the Acts of Congress hereinbefore set forth.

It will be noted that in each case the beneficiaries are to enjoy the income from the property during the life of the trust, and the corpus of the trust is to be managed by the trustees for the sole use and benefit of the various legatees. Under these circumstances it would seem that the legatees are the true owners and that they are having the enjoyment of the property immediately and the tax involved is imposed upon the right of the respective legatees to the enjoyment of their legacies. In other words, the right to the enjoyment of these legacies is a definite property right capable of exact valuation. While the trust property itself did not pass into the hands of the beneficiaries, the right to the income and the right of enjoyment of these legacies is a definite property right capable of exact valuation. While the trust

property itself did not pass into the hands of the beneficiaries, the right to the income, and thereby the right of enjoyment of the property, became immediately vested.

The government has declined to refund to the respective defendants in error the taxes imposed and collected, upon the theory that these legatees had the immediate right of enjoyment coupled with the fact that they had their respective equitable titles for the terms of the respective trusts.

Up to the present time the question involved in these cases has never been definitely settled by the Supreme Court of the United States, although there is now pending before that tribunal a case involving the precise proposition involved in the cases under discussion. Upon this point, there has been a diversity of opinion by various Circuit Courts of the United States.

Recently we had occasion to present to this Court the views of the government in the case of *Lynch, Collector, etc., vs. Union Trust Company of San Francisco*, reported in 164 Fed. 161, in which case the Court held against the contention of the government. Inasmuch as the point involved is one of great interest and importance to the government, and is one of considerable nicety, we submit that upon a

more careful consideration this Court will uphold the views which we now present.

Respectfully submitted,

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